

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 1995-1202-E - ORDER NO. 2000-1011
DECEMBER 15, 2000

IN RE: Pacolet River Power Company, Inc.,)	
Complainant,)	
)	
vs.)	ORDER RULING ON
)	VARIOUS MOTIONS
Duke Power Company,)	
Respondent.)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on various motions by Duke Power Company n/k/a Duke Power, a division of Duke Energy Corporation (Duke) and Pacolet River Power Company, Inc. (Pacolet) in this complaint matter.

Initially, Duke moves for dismissal of the complaint, based on alleged "material noncompliance" of Pacolet with Commission Order No. 2000-819. In return, Pacolet filed a response to Duke's Motion, as well as a Motion for Extension of Time to File Witness List, and a Motion for Use of Testimony of Christina L. Sommer. Finally, Duke filed a response to Pacolet's Motions.

First, Duke moves for dismissal of Pacolet's complaint, based on the fact that Pacolet failed to serve and file its witness list in the case on or before November 27, 2000, as required by Order No. 2000-819. Duke claims prejudice from the lack of filing. In its response to the Motion, Pacolet noted that it filed its witness list on December 1,

and hand-delivered the document to the parties on that date during a meeting at the Commission's offices. Pacolet further noted that its filing on December 1, 2000 will not operate to prejudice Duke, and that Pacolet and Duke had not completed their discussions related to previously filed discovery and exhibits by November 27, 2000. In addition, Pacolet moves for an Order extending the date for filing the witness list to December 1, 2000.

We deny the Motion to Dismiss, and grant Pacolet's Motion to extend the time for the filing of the witness list until December 1, 2000. Although we cannot condone Pacolet's failure to file the list in compliance with our Order No. 2000-819, we do not believe that Duke was substantially prejudiced by the filing of the witness list on December 1, 2000. This still gives Duke ample time to prepare for the late-January hearing. We do caution Pacolet, however, to comply with time deadlines set out by this Commission in the future.

Further, Pacolet moves for an Order allowing the use of the written testimony given by Christina L. Sommer in the prior trial of this case. Pacolet notes that it is not able to afford the cost and expenses for Sommer to appear again at the new hearing, presently scheduled for January 23, 2001. Pacolet further states its desire to have Sommer's testimony read into the record using the procedure used for the use of depositions at trial pursuant to Rule 32 of the Rules of Civil Procedure. Duke strongly opposes this motion, and notes that it has been the long-standing policy of this Commission to require a witness to testify in person and be available for cross-examination by other parties, as a general rule. Duke also notes, among other things, that

the majority of the present Commissioners were not in office at the time of the original hearing in this case, and, therefore, have had no opportunity to hear the testimony of Ms. Sommer in person.

We must deny Pacolet's Motion. First, we would note that Rule 32, SCRCR, applies only to the use of depositions as testimony under certain prescribed circumstances. The present situation does not involve the use of deposition testimony, but the use of prior testimony in a Commission proceeding. We would note that Rule 804, SCRE states that the use of former testimony in a proceeding is an exception to the general rule excluding hearsay evidence from use in proceedings. However, the provisions of that rule state that the witness must be unavailable for the use of the former testimony, and "unavailability as a witness" is then specifically defined. Pacolet has not stated any facts which would show that Ms. Sommer fits into any portion of that definition. On the basis of the rule, we must deny Pacolet's Motion. As an additional ground, we would note that our Order No. 2000-819 held that all witnesses must be present during any hearing in this matter at the call of the Chairman, or the Commission may decline to allow the witness' testimony and/or exhibits into the evidence of the case.

We also disallow the use of the written testimony from the previous hearing on policy grounds. We believe that, since the majority of the present Commission has not been able to see Ms. Sommer, nor to judge her credibility for themselves, it would be inappropriate to allow the use of her prior written testimony. The Motion is denied.

In summary, we deny Duke's Motion to Dismiss, grant Pacolet's Motion for an Extension of Time in which to file the witness list, and deny Pacolet's Motion to use

prior testimony of Ms. Sommer in the upcoming hearing. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)